FILED
JUL 1 1983
ALEXANDER L. STEVAS,
CLERK

82-2160

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CARL SPARANO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,
SECRETARY OF THE ARMY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Where the decision of the Army Board for Correction of Military Records is so totally devoid of evidentiary support in the record is its decision concerning petitioner a deprivation of petitioner's due process rights under the Fifth Amendment.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Statement of Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2
Facts	2
Relevant Procedural History	5
Reasons for Granting the Writ	10
Argument	10
Conclusion	19

INDEX TO APPENDIX*

	PAGE
December 1976 Decision of the Army Board for Correction of Military Records	1a
March 1980 Application to the Army Board for Correction of Military Records	5a
December 1980 Decision of the Army Board for Correction of Military Records	14a
Complaint	19a
Answer	22a
Pretrial Order	25a
District Court Opinion on Motion for Summary Judgment	33a
Order Granting Motion for Summary Judgment	38a
Notice of Appeal to U.S. Court of Appeals for the Third Circuit	39a
Order of U.S. Court of Appeals for the Third Circuit Affirming Judgment of District Court	40a
Order of U.S. Court of Appeals for the Third Circuit Denying Reconsideration and Rehearing	42a
Order of U.S. Court of Appeals for the Third Circuit for Stay of Mandate	44a
5 U.S. Code Section 704	45a
10 U.S. Code Section 1552	45a
28 U.S. Code Sections 1254, 1331, 1361, 2201, 2202	47a
Extracts of Army Regulation 15-185	48a
Extracts of Army Regulation 135-155	50a

* The Appendix to this Petition is referred to herein as "Pa."

TABLE OF AUTHORITIES

Cases Cited: PAGE

Boyd v. United States, 207 Ct. Cl. 1 (1975), *cert. denied*, 424 U.S. 911 (1976) 14

Caddington v. United States, 178 F. Supp. 604 (Ct. Cl. 1959) 12

Chicago, Milwaukee, St. Paul & Pac. R. Co. v. Illinois, 355 U.S. 300 (1958) 14

Cooper v. United States, 203 Ct. Cl. 300 (1973) 14

Dickinson v. United States, 346 U.S. 389 (1953) 14, 15

Dilley v. Alexander, 603 F.2d 914 (1979), *opinion clarified*, 627 F.2d 407 (D.C. Cir. 1980) 13, 16

Doyle v. United States, 599 F.2d 984 (Ct. Cl. 1979), *cert. denied*, 446 U.S. 982 (1980) 11, 12

Duhon v. United States, 461 F.2d 1278 (Ct. Cl. 1972) .. 12

FCC v. Allentown Broadcasting Corp., 349 U.S. 358 (1958) 14

FTC v. Standard Oil Co., 355 U.S. 396 (1958) 14

Fuller v. Alexander, 440 F.Supp. 380 (D.D.C. 1977)....11, 13

Gondeck v. Pan American World Airways, 382 U.S. 25 (1965) 14

Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974) 13, 16

Hoorwitz v. Resor, 329 F.Supp. 1050 (D.Conn. 1970), *aff'd.* 445 F.2d 1407 (2d Cir. 1971) 13

Horn v. Schlesinger, 514 F.2d 549 (8th Cir. 1975) 13

Johnson v. Reed, 609 F.2d 784 (5th Cir. 1980)..... 13

Jones v. Alexander, 609 F.2d 778 (5th Cir. 1980), *cert. denied*, 446 U.S. 982 (1980) 13

PAGE

Muldonian v. United States, 432 F.2d 443 (Ct. Cl. 1970) 11

Neal v. Secretary of the Navy, 639 F.2d 1029 (3d Cir. 1980) 13, 16

NLRB v. Pittsburg Steamship Co., 340 U.S. 498 (1951) 14

O'Keefe v. Smith, Hinchman & Greylls Associates, 380 U.S. 359 (1965) 14

Radio Officers' Union v. NLRB, 346 U.S. 17 (1954) ... 14

Ragoni v. United States, 424 F.2d 261 (3d Cir. 1970) ... 11, 13

Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979) .. 11, 12, 13, 18, 19

Skaradowski v. United States, 471 F.2d 627 (Ct. Cl. 1973) 12

Skinner v. United States, 594 F.2d 824 (Ct. Cl. 1979) .. 14, 19

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 14

Weis v. United States, 408 F.2d 416 (Ct. Cl. 1969) 18

Yee v. United States, 512 F.2d 1383 (Ct. Cl. 1975) 12, 13

U.S. Constitution Cited:

Fifth Amendment U.S. Constitution ..... i, 10

Statutes Cited:

5 U.S.C. Section 702 ..... 2, 9, 11

10 U.S.C. Section 1552 ..... 2, 10, 15

10 U.S.C. Section 3442(c) 18

10 U.S.C. Section 8442(c) 18

28 U.S.C. Section 1254(1) 1, 2, 9

28 U.S.C. Section 1331 2

PAGE

28 U.S.C. Section 1343 11

28 U.S.C. Section 1361 ..... 2, 11

28 U.S.C. Section 2201 ..... 2, 11

28 U.S.C. Section 2202 ..... 2, 11

28 U.S.C. Section 2680(h) 16

68 Stat. 1147 (Act of Sept. 3, 1954) 12

Regulations Cited:

Army Regulation 15-185 11

Army Regulation 135-155 .....2, 3, 7, 15, 16

Court Rules Cited:

U.S. Supreme Court Rule 17 10

Federal Rules of Appellate Procedure Rules 35(h) and 40(a) 9

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Third Circuit denying petitioner's appeal from the judgment and order of the United States District Court for the District of New Jersey was issued on March 14, 1983 (Pa 40). A timely petition for rehearing and reconsideration was denied on April 7, 1983 (Pa 42). Accordingly, this Court has jurisdiction to issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. Section 1254(1) in this case.

STATUTORY PROVISIONS INVOLVED

The statutory provisions relevant to this petition, 5 U.S.C. Sections 702 and 704, 10 U.S.C. Section 1552, and 28 U.S.C. Sections 1254, 1331, 1361, 2201, 2202, are reprinted in the Appendix hereto (Pa 45-48).

STATEMENT OF THE CASE

A. Facts

Petitioner was commissioned a Lieutenant in the Finance Corps, United States Army Reserve, on June 2, 1963. (Pa 3). Petitioner entered upon active duty on January 4, 1964. He was released from active duty on December 30 1965, after completing two years service. (Pa 3). Petitioner then continued his military career in the 78th Division (Training) of the Army Ready Reserve. (Pa 8). He was promoted to the rank of Captain on January 18, 1968. (Pa 3). At that time, the Army required Reserve Captains to complete 50% of the Officer Advanced Course in order to be promoted to Major. (Pa 7). Such courses are normally completed through correspondence with an Army service school. Petitioner enrolled in the Finance Officer Advanced Course and proceeded to work toward the criteria for promotion. (Pa 8).

Petitioner transferred to an active control group in the Reinforcement Reserve on or about January 1, 1973. (Pa 29). This transfer was unfortunate for petitioner for a number of reasons: First: as a member of a control group instead of a troop program unit, petitioner was put out of touch with Army affairs. Thus, he was unaware that the Army changed Army Regulation 135-155 to require Captains to complete 100% instead of 50% of the Advanced Course for promotion to Major. (Pa 29). Second: if petitioner had transferred to an inactive control group instead of an active one, the mandatory time for promotion to Major would have been suspended. Army Regulation 135-155 Para. 2-2. (Pa 29). Unfortunately,

this little known provision was not made known to petitioner when he transferred out of the Division. (Pa 29).

For many years prior to 1974, the Army Promotion Board for Majors had been held in September. However, in 1974 it was rescheduled for April. (Pa 29). In December 1973, petitioner received a notice stating that in April 1974, he would be considered for promotion. In February 1974, petitioner received another notice stating that Officers selected for promotion would be given until September 5, 1974 to complete "required military education."

According to the Administrative Record, petitioner was selected for promotion to Major with the proviso that he complete the educational requirements by September 5 1974. (Pa 29). However, there is no indication in the record that petitioner was ever notified of his selection for Major. Petitioner never saw a copy of this notification letter until October 1974. Also, in October 1974, petitioner received a notice stating that he had not been selected for promotion because of his failure to meet the educational requirements. (Pa 30).

Petitioner transferred back into the 78th Division in October 1974. (Pa 29). As he was processing back into the Division, the Assistant Adjutant General of the unit, Chief Warrant Officer Francis Dreher, informed petitioner that he should complete the Finance Officer Advanced course by September 1975, in order to be ready for the next promotion board. (Pa 29-30). Petitioner resumed work on the Advanced Course fully anticipating that he would complete it by September 1975. (Pa 29-30). Unbeknownst to petitioner and CWO Dreher, Captains did not have until September 1975 to complete all educational requirements for promotion. The promotion board prepared to again meet in April 1975. In December 1974, contrary to Army Regulation 135-155 Para. 3-4, Petitioner was not notified, as he had previously been the year before, of his upcoming consideration for promotion. (Pa 50).

In mid-December 1974, CWO Dreher received a circular informing him of the April 1975 promotion board. In Febru-

ary 1975, Dreher told Petitioner that he had only until April 1, 1975 to complete the Advanced Course, and that the previous information concerning a September 1975 deadline, was erroneous. (Pa 29).

Petitioner took immediate action to obtain a bulk issue of courses from the U.S. Army Institute of Administration ("USAIA"), the agency conducting the Finance Officer Advanced Course. At that point in time, Petitioner had approximately 80-90% of the Advanced Course completed. He planned to take some vacation time from his full-time civilian job to finish the course. Petitioner telephoned the school explaining his problem. He also wrote to the school requesting the necessary course material on February 6, 1975. This was the beginning of a long series of frustrating efforts on petitioner's part to get the school to help him and honor announced Army policy. (Pa 29-30).

On February 1, 1975, the Army had decided to convert the correspondence school system to a computerized system. On February 1, 1975, the USAIA announced the conversion, but stated:

> The USAIA is still the point of contact for individuals enrolled or enrolling in our correspondence course program. Our counselors are still available to assist you *and we will continue to respond to all student requests, questions and comments.*

(Pa 30). [Emphasis added.]

In March 1975, the announced USAIA school policy was stated as follows:

> Normally, if you are enrolled for two or more selected subcourses, you are sent three subcourses when you are enrolled. Thereafter, one additional subcourse is sent each time that an examination is graded. *If this rate of issue is too slow or too fast for you let us know and we will change our schedule to suit you.*

(Pa 30). [Emphasis added.]

The fact of the matter was exactly contrary to the public pronouncements. When a new Chief of the Administration and Processing Branch (Captain Ansell) of USAIA took over in January 1975, he found over 5,000 pieces of unanswered correspondence. In effect, the school which was supposed to provide the means for Petitioner to meet promotion criteria was shut down by the Army. Captain Ansell indicates that USAIA would not honor petitioner's request for a bulk issue for course material. In fact, the USAIA refused to honor petitioner's request. (Pa 30).

As a result of the Army's closing the school without any suspension of educational requirements or other special arrangements for students such as petitioner who were denied the opportunity to complete required courses before April 1, 1975, petitioner was educationally unqualified for promotion when the promotion board met in April 1975.

On June 23, 1975, the Army sent petitioner a letter indicating that he had been nonselected for promotion a second time because of his failure to meet educational requirements and he must either elect discharge or transfer to the retired reserve. On July 22, 1975, petitioner elected to transfer to the retired reserve effective July 30 1975. (Pa 3).

On April 7, 1975, the USAIA had resumed sending material to petitioner but persisted in refusing a bulk issue or any speed up in "normal processing." After much more delay by the USAIA, petitioner completed the Advanced Course by September 8, 1975, and was issued a diploma on September 25, 1975. (Pa 9-10).

B. Relevant Procedural History

On June 29, 1976, petitioner, without the aid of counsel, submitted a petition for relief to the Army Board for Correction of Military Records (hereinafter "ABCMR") (Pa 1). He requested that the promotion board's action be set aside and that he be considered for promotion by a standby promotion board. His justification for this request was the fact that the

USAIA had closed the Advanced Course at the point in time when it was crucial for him to complete it. The Correction Board found "insufficient evidence of injustice." (Pa 1). It stated:

> The fact that he did not qual [sic] for prom [sic] educationally cannot be imputed to the Department. There is no assurance that he would have been sel [sic] had he been educationally qual [sic] at the time of his consideration.

(Pa 4).

On June 23, 1977, petitioner rejoined the 78th Division and the active ready reserve by enlisting as a sergeant. (Pa 17).

In 1979, these events were brought to the attention of Major General James Mc Elroy, the new Commander of the 78th Division. He appointed Major Robert Baldwin, an officer in the Judge Advocate General's Corps to look into the matter and aid petitioner if possible.

With the assistance of Major Baldwin, petitioner submitted a second application to the ABCMR, on March 29, 1980. (Pa 5-14). In his second ABCMR application, petitioner requested the following relief: *inter alia*, (1) That the findings and recommendations of the USAR promotion board convened on April 1975 be set aside; (2) That he be considered for promotion by a standby promotion board, or alternatively, his military records be corrected to reflect selection to promotion to Major on September 25, 1975; (3) That he be awarded any difference in pay resulting from a promotion described above; (4) Correction of appropriate records; and (5) Such other and further relief the ABCMR deemed just and proper. (Pa 5).

Petitioner justified his right to the relief sought by specifying and documenting the following improprieties concerning his nonselection for promotion:

> The injustice complained of is the Applicant's nonselection for promotion from Captain (USAR) to Major (USAR) by a USAR promotion board convened on 1

April 1975 causing him to be charged with a second promotion passover and forcing him to elect transfer to the Retired reserve in the grade of Captain (USAR). The injustice complained of resulted from a combination of the following events and circumstances making it impossible for the Applicant to complete the Finance Officers Advanced Course by April 1975.

1. Erroneous advice by CW4 Francis T. Dreher, Assistant Adjutant General, 78th Division (Tng), Kilmer USAR Center, Edison, New Jersey 08817, in October of 1974 to the effect that the Applicant would have at least until 1 September 1975 in which to complete his military educational requirements for promotion to Major (USAR).

2. Failure of the appropriate promotion authority to furnish the Applicant with the notice of consideration required by para. 3-4a, AR 135-155 (30 August 1974), which would have properly notified the Applicant at the earliest possible time of the date on which the CY 75 captains to majors USAR promotion board would be convened.

3. Correction of CW4 Dreher's erroneous advice within the 78th Division (Tng) at a time (in early February of 1975) when it was impossible for the Applicant to obtain a bulk issue of the subcourses needed in order to complete the Finance Officers Advanced Course.

4. TRADOC's decision to convert the correspondence courses handled by the U.S. Army Institute of Administration (USAIA) from a manual to the automated system of administration (TRADOC Educational Date System (TREDS)) without making any provision to rectify the administrative dilemma which as a result of the conversion necessarily confronted students otherwise subject to time constraints and the time for officers otherwise selected for promotion to complete educational requirements in 1975 to include the 6-month period utilized by USAIA to convert to TREDS.

5. HQDA's failure to extend the time for completing educational requirements, in the case of officers to be considered for promotion by CY 75 USAR promotion boards either (1) due to the permanent advancement of the convening date in 1975 as in the case of the captains to majors board from 5 September to 1 April or (2) due to TRADOC's decision to convert correspondence courses handled by USAIA from a manual to an automated system of administration (TREDS), the conversion spanning a 6-month period.

(Pa 6-7).

On November 19, 1980, the ABCMR rendered its decision. The decision stated:

DISCUSSION: It does appear that the applicant's failure to complete the military educational requirements was *the cause* of his nonselection for promotion to the grade of major in the USAR.

Applicant has a number of contentions which he alleges caused him to fail to timely complete the Finance Officer Advanced course. That the course subjects were undergoing revision in 1974-75 preventing him from receiving the material and that a warrant officer had given him erroneous information in 1975 concerning the amount of time he had to complete the education requirements. It appears, however, that he simply waited too late to make an effort to complete the requirements. He was promoted to captain, USAR, in 1968 and the requirements for promotion to major, USAR, were announced in early 1969.

In consideration of all evidence, allegations, and information presented by the applicant in relation to the evidence of all available records, statutory, regulatory, and staff opinions pertaining thereto, it is concluded that there is insufficient justification for changing the records to show that the applicant was selected and promoted to the grade of major in the USAR.

> DETERMINATION: The applicant has failed to submit sufficient relevant evidence to demonstrate the existence of probable material error or injustice to warrant a formal hearing.

(Pa 17-18).

The decision of the ABCMR was sent to petitioner on December 3, 1980. Petitioner filed an action in the United States District Court for the District of New Jersey on June 11, 1981 seeking judicial review of the decision of the ABCMR under 5 U.S.C. Section 702. On cross-motion, summary judgment was granted in favor of the respondent Secretary of the Army.[1] (Pa 38).

Petitioner filed a Notice of Appeal to the Third Circuit Court of Appeals on August 27, 1982. (Pa 39). Both petitioner and respondent submitted briefs and oral argument was heard on March 9, 1983 before a panel composed of Chief Judge Seitz and Circuit Judges Higginbotham and Sloviter. On March 14, 1983, a Judgment Order was entered which affirmed the judgment of the District Court. (Pa 40a).

A petition for rehearing on behalf of petitioner was submitted under the provisions of Rules 35(b) and 40(a) of the Federal Rules of Appellate Procedure for both panel rehearing and rehearing en banc. This petition was denied on April 7, 1983. (Pa 42). Accordingly, under the provisions of 28 U.S.C. Section 1254(1), petitioner has filed the instant petition for a Writ of Certiorari.

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1 Hereinafter sometimes referred to as "Army" or respondent.

REASONS FOR GRANTING THE WRIT

The reasons for granting the writ may be summarized as follows:

The administrative record before the ABCMR and in the courts below indicate uncontradicted evidence that the respondent committed legal error amounting to an injustice within the terms of 10 U.S.C. Section 1552. The respondent's decision that there was no legal error and its consequent denial of relief to petitioner on a record totally devoid of any evidentiary support renders its decision unconstitutional under the Due Process Clause of the Fifth Amendment. Thus, the instant case involves an important issue relating to the administration of a federal statute. Further, the decision of the Court of Appeals and the District Court jeopardizes the availability of the remedy available under 10 U.S.C. Section 1552 as they appear to be in conflict with decision of the United States Court of Claims in *Doyle v. United States,* 599 F.2d 984 (Ct. Cl. 1979) *cert. denied* 446 U.S. 982 (1980). This conflict impairs the proper administration of justice in the federal courts and vitally concerns the administration of a remedy under a federal statute. In view of these factors it is submitted that the instant case presents those "special and important reasons" under U.S. Supreme Court Rule 17 which warrant the Court in exercising its discretion in favor of granting the Writ of Certiorari.

Argument

The issue presented for review in the Court of Appeals and the District Court was whether the ABCMR acted properly on petitioner's claim for relief. The statutory authority for the establishment of the ABCMR is found in 10 U.S.C. Section 1552 (Pa 45), which provides in pertinent part:

> (a) The Secretary of the military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the

> executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice.
>
> * * *
>
> (c) The department concerned may pay from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits . . . if, as a result of correcting a record under this section, the amount is found to be due to claimant on account of his . . . services in the Army . . . as the case may be . . .

The ABCMR was established pursuant to the above-cited statute by virtue of Army Regulation 15-185, Paragraph 3 (18 May 1977). (Pa 48). That regulation provides, *inter alia,*

> The function of the Board is to consider all applications properly before it for the purpose of determining the existence of an error or an injustice.

It is within the power of the ABCMR to review promotion non-selections of Army Reserve Officers, for compliance with applicable statutory and regulatory provisions. *See, Doyle v. United States,* 599 F.2d 984 (Ct. Cl. 1979); *Muldonian v. United States,* 432 F.2d 443 (Ct. Cl. 1979); *see also, Fuller v. Alexander,* 440 F.Supp. 380 (D.D.C. 1977).

The decision of the ABCMR is reviewable in a United States District Court by mandamus, 28 U.S.C. Section 1361, or declaratory judgment, 28 U.S.C. Section 2201, or judicial review of administrative action under the Administrative Procedure Act, 5 U.S.C. Section 702; *Ragoni v. United States,* 424 F.2d 261, 263 (3d Cir. 1970); *Sanders v. United States,* 594 F.2d 804, 810-12 (Ct. Cl. 1979).[2] (Pa 45, 47).

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2 Jurisdiction for the instant case was predicated on various alternative theories: 28 U.S.C. Section 1331 (federal question) 28 U.S.C. Section 1343 (civil rights); 28 U.S.C. Section 1361 (mandamus); 28 U.S.C. Subsection 2201, 2202 (declaratory judgment); and 5 U.S.C. Section 702 (review of administrative proceedings). (Complaint Paragraph 4, Pa 19)

In view of this statutory and regulatory background of the power of correction boards, it has been stated that when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate, and such a violation contrary to the evidence, is arbitrary and capricious. *Yee v. United States,* 512 F.2d 1383, 1387 (Ct. Cl. 1975) citing *Skaradowski v. United States,* 471 F.2d 627 (Ct. Cl. 1973). "Military correction boards '*have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief.*' " *Duhon v. United States,* 461 F.2d 1278, 1281 (Ct. Cl. 1972) quoting *Caddington v. United States,* 178 F.Supp. 604, 607 (Ct. Cl. 1959) (Emphasis supplied).

In the context of reviewing a nonselection for promotion of reserve officers under the Reserve Officer Personnel Act of 1954, Act of Sept. 3, 1954, 68 Stat. 1147, and the regulations promulgated thereunder, it has been stated:

> Under statutes and regulations governing military personnel, an officer is separated or retired when he has been passed over by two selection boards for the same rank. We affirm our holding in *Sanders v. United States, supra,* that an officer cannot be terminated under the two-pass-over rule unless he has had *two fair chances at promotion* as required by the statute and regulation . . . This we deem to be an officer's basic right.

Doyle v. United States, 599 F.2d 984, 997 (Ct. Cl. 1979) (Emphasis added).

It is submitted that considering the principles articulated in *Doyle, supra,* and *Yee, supra,* the failure of the ABCMR to grant petitioner's relief clearly violated its mandate to correct an injustice. The injustice being, in general, the lack of two *fair* chances for promotion to grade of major, and specifically, the uncontroverted violation by respondent of various regulations governing the promotion process. The decision of the ABCMR not to provide petitioner with appropriate relief, in the face of a record totally devoid of *any* evidence to support

its decision, denied petitioner his due process rights under the Fifth Amendment to the United States Constitution. The Court of Appeals' and the District Court's affirmance of the ABCMR decision is a further denial of petitioner's due process rights.

It is well settled that the standard which a federal court is to apply when reviewing a decision of the ABCMR is whether the decision was arbitrary or capricious in view of the record before it. *Neal v. Secretary of the Navy*, 639 F.2d 1029, 1036 (3d Cir. 1980); *Ragoni v. United States*, 424 F.2d 261, 263 (3d Cir. 1970). The same standards are applied in the trial court and on appeal. See, *Neal v. Secretary of the Navy*, *supra* at 1036; *Fuller v. Alexander*, 440 F.Supp. 380 (D.D.C. 1977). *See also*, *Dilley v. Alexander*, 603 F.2d 914 (1979), *opinion clarified* 627 F.2d 404 (D.C. Cir. 1980); *Johnson v. Reed*, 609 F.2d 784 (5th Cir. 1980); *Jones v. Alexander*, 609 F.2d 778, *cert. denied*, 446 U.S. 982 (1980); *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979); *Horn v. Schlesinger*, 514 F.2d 549 (8th Cir. 1975); *Yee v. United States*, 512 F.2d 1383 (Ct. Cl. 1975); *Brundage v. United States*, 504 F.2d 1382 (Ct. Cl. 1974); *Hodges v. Callaway*, 499 F.2d 417 (5th Cir. 1974); *Duhon v. United States*, 461 F.2d 1278 (Ct. Cl. 1972); *Hoorwitz v. Resor*, 329 F.Supp. 1050 (D. Conn. 1970), *aff'd.*, 445 F.2d 1407 (2d Cir. 1971).

A representative statement of the test, cited with approval by the Third Circuit in *Neal v. Secretary of the Navy*, *supra* at 1029, 1037, was set forth in *Sanders v. United States*, 594 F.2d 804, 811 (Ct. Cl. 1979):

> Congress has acted by providing servicemen with an administrative remedy for their wrongs. Once a plaintiff has sought relief from the Correction Board, such plaintiff is bound by that Board's determination unless he can meet the difficult standard of proof that the Correction Board's decision was illegal because it was *arbitrary, or capricious or in bad faith, or unsupported, by substantial evidence, or contrary to law, regulation*, or mandatory

> published procedure of a substantive nature by which plaintiff has been seriously prejudiced, and money is due. *See, e.g., Skinner v. United States*, 594 F.2d 824 (Ct. Cl. 1979); *Boyd v. United States*, 207 Ct. Cl. 1 (1975), cert. denied, 424 U.S. 911, 96 S. Ct. 1006, 47 L. Ed.2d 315 (1976); *Cooper v. United States*, 203 Ct. Cl. 300, 304 (1973). (Emphasis added).

In light of this standard, it was argued below that the decision of the ABCMR was illegal and should be reversed. The instant case is now in a posture where an administrative agency has rendered a decision against petitioner, and the decision was upheld by the District Court and also upheld by the Court of Appeals. It is quite easy for one to view the case quite unfavorably against the petitioner in light of the oft-quoted case of *NLRB v. Pittsburg Steamship Co.*, 340 U.S. 498 (1951), wherein it was stated:

> Congress has charged this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders . . . This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.

340 U.S. at 502-03. *See also, FTC v. Standard Oil Co.*, 355 U.S. 396, 401 (1958); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951). Despite the frequent statement by the Court of that principle, exceptions are common. *Chicago, Milwaukee, St. Paul & Pac. R. Co. v. Illinois*, 355 U.S. 300, 310 (1958); *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955); *Radio Officers' Union v. NLRB*, 346 U.S. 17 (1954).

The procedural posture of the instant case is analogous to that in *Dickinson v. United States*, 346 U.S. 389 (1953) where this Court set aside a finding made by (1) a local draft board, and upheld by (2) a state appeal board, (3) a national appeal board, (4) the District Court, and (5) the Court of Appeals. All

the evidence presented was in favor of Dickinson, however all five tribunals below this Court disbelieved it. This Court granted certiorari and reviewed the complete administrative record to determine whether petitioner met the applicable statutory criteria. See also, *Gondeck v. Pan American World Airways*, 382 U.S. 25 (1965); *O'Keefe v. Smith, Hinchman & Greylls Associates*, 380 U.S. 359 (1965).

The instant case is directly analagous to *Dickinson v. United States, supra*. The evidence presented by petitioner is uncontradicted and fulfills the statutory criteria of "injustice" of 10 U.S.C. Section 1552. Thus, the ABCMR decision has no basis in fact and as the record is totally devoid of evidence to support its decision, the failure of the ABCMR to grant the requested relief is a denial of the due process rights of petitioner. A brief synopsis of petitioner's contentions and the evidence below will clearly illustrate the character of "injustice" visited upon petitioner.

First, not only was petitioner deprived of one fair chance at promotion, but he was deprived of two *fair* chances. As discussed in detal above, petitioner was not even aware that he was selected for promotion to Major by the April 1974 promotion board with the proviso that he complete the educational requirements by September 5, 1974. (Pa 29). Petitioner did not know of his "conditional" selection until he processed into the 78th Division in October 1974, by which time it was obviously too late. (Pa 29). The Army violated its regulations governing promotion in that petitioner never received notice, mandated by the regulation, that he was selected for a "conditional" promotion until the time limit for the fulfillment of the condition had passed. Army Regulation 135-155, paragraph 4-13 (Pa 29, 50).

Second, petitioner never had a chance at a second *fair* chance at promotion because of several factors:[3]

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3 These factors are set forth in great detail in petitioner's application to the ABCMR found at Pa 5-14.

(a) The Army prevented petitioner from completing the Finance Officer's Advanced Course by closing down the school and not providing him with a bulk issue of course material (which if he had received, he could have completed in a timely manner by the April 1975 deadline);

(b) Petitioner received no notice that he was being considered for promotion by the April 1975 board until February 1975, contrary to Army Regulation 135-155, paragraph 3-4a (30 August 1974). (Pa 50).

(c) Petitioner relied on the erroneous advice of CWO Dreher that if petitioner was being considered by the April 1975 promotion board, he would have until September 1975, just as in the prior year, to complete his educational reuqirements.[4] At this point in time Petitioner had 60% of the Advanced Course completed, and had anticipated completing the course by June 1975, three months ahead of what he believed the deadline to be, based on Dreher's advice. (Pa 29).

It is clear that an agency, here the Army, is bound to abide by the regulations it promulgates. *Neal v. Secretary of the Navy*, 639 F.2d 1029, 1035 (3d Cir. 1980); *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979); *Hodges v. Callaway*, 499 F.2d 417, 419 (5th Cir. 1974). The Army violated its own regulations governing promotions in several respects.

First, Army Regulation 135-155, paragraph 3-4a, (30 August 1974), provides that the promotion authority will send a letter to each nominee who is in the zone of consideration by a mandatory selection board. (Pa 50). The purpose of this letter is to give the nominee the opportunity to review and verify various personnel data. Petitioner never received the letter of

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4 This "erroneous advice" of CWO Dreher may have been characterized in the Complaint at paragraph 7 and in the District Court proceedings as a "misrepresentation." This characterization was not meant to allege an actionable misrepresentation which is barred by 28 U.S.C. Section 2680(h), but merely to indicate the information Dreher conveyed and upon which petitioner relied.

notification required by this regulation. Petitioner first learned he would be considered for promotion a second time in February 1975, when he was informed by CWO Dreher. (Pa 29-30).

Second, petitioner never had the proper amount of time to complete his mandatory military education. Assuming one may impute knowledge of a myriad of regulations to an officer, one usually proceeds on the premise that he has a certain amount of time to complete his military education by the convening date of a promotion board. One also assumes that the Army school administering the appropriate correspondence course will be in existence. In February 1975, to petitioner's chagrin, two events threatened, and eventually terminated, his career as an Army Reserve officer. He learned that he had less than two months to complete his educational requirements by the convening date of the board. At this point in time, petitioner was prepared to take as much time as needed from his civilian job to accomplish this task. Admittedly, if he failed to complete the course without making *any* effort one may agree that the second "pass-over" was attributable to petitioner's lack of effort. However, superimposed on this advanced completion date, the Army effectively cut off the only means by which petitioner could accomplish his objective. The Army closed the correspondence school. Imagine oneself in petitioner's situation. He had completed 80% of the educational requirements with only 20% left and a time-frame of approximately two months in which it could be accomplished (considering he was to devote his full-time attention to the matter). The Army then effectively says no, you cannot have the materials to accomplish the task. It is submitted that this is hardly a fair, equitable and just method of administering a course, let alone a promotion system.

It is submitted that the principle involved here is no different if it were the case that petitioner, or any other officer for that matter, waited until February 1975 to commence the Advanced Course. Assume that the reserve officer was dedicated enough to take time off from his civilian occupation and devote all or

almost all of his waking hours of the next two months to complete the work; then, at that point, the Army shut the school down. Certainly the regulation requiring completion of mandatory education requirements must assume or must have an implicit requirement therein that the Army will not terminate the very means to accomplish the tasks, it, the Army sets. The Army Regulations governing promotion and setting forth mandatory educational requirements are not conditioned by a requirement that the officer not "wait too long" to complete his course. If the requirements have any implicit condition it must be that the Army not cut off the means to accomplish the requirements, as it did in petitioner's case.

In retrospect, petitioner's conduct did not indicate that he "simply waited too long" to attempt completion of the requirements. For as the record clearly shows, petitioner did complete the Advanced Course in September 1975, as would have normally been required, despite the delay caused by the Army. (Pa 30).

The above clearly indicates that the Army's action caused an "injustice" to petitioner in regard to the completion of his educational requirements. The ABCMR found that the fact that petitioner failed to complete the military educational requirements was the cause of his nonselection for promotion to major. However, the record clearly indicates that the failure to complete the requirements was caused by the Army, and not petitioner. This "injustice" resulted in the failure of the selection board to consider petitioner on the basis of a record which portrayed his service career on "a fair and equitable basis as the statutes require." 10 U.S.C. Subsection 3442(c); 8442(c). It has been held that a substantially complete and fair record is a necessary requirement of proper consideration by a selection board. *Sanders v. United States*, 594 F.2d 804, 814 (Ct. Cl. 1979). *See also, Weiss v. United States*, 408 F.2d 416, 419 (Ct. Cl. 1969).

In the submission of his request for relief to the ABCMR, petitioner documented all of the above events. The administra-

tive record does not reflect any evidence which contradicts petitioner's position. Thus, it is submitted in view of the above, that the finding of the ABCMR that petitioner failed to submit sufficient material evidence to demonstrate an "injustice" is arbitrary, capricious, unsupported by substantial evidence and contrary to law and regulation, within the doctrine of *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979) and *Skinner v. United States*, 594 F.2d 824 (Ct. Cl. 1974). Accordingly, the decision of the ABCMR should be set aside, as well as the decision of the Court of Appeals and the District Court.

CONCLUSION

For all the foregoing reasons, petitioner, Carl Sparano, prays that a Writ of Certiorari to the Court of Appeals for the Third Circuit be granted so that this Court may review the instant case.

Respectfully submitted,

/s/ Kenneth J. Hanko
KENNETH J. HANKO
HARPER & HANSBURY, P.A.
Attorneys for Petitioner
Carl Sparano
736 Speedwell Avenue
P.O. Box 198
Morris Plains, New Jersey 07950

Dated: July 1, 1983

APPENDIX

December 1976 Decision of the Army Board For Correction of Military Records

AGUZ-SAD-CO Sparano, Carl P. 6 DEC 1976
154 30 3390 4/24

CPT Carl P. Sparano-Retired
303 Dixon
Boonton, NJ 07005

Dear Captain Sparano:

The Army Board for Correction of Military Records has asked me to inform you of their decision regarding your application for correction of military records.

The Board may deny an application if a sufficient basis for review has not been established. After examining and considering your U.S. Army records and facts you presented, the Board determined on 22 September 1976 that insufficient evidence has been presented to indicate probable material error or injustice; accordingly, your application was denied.

In the absence of new and material evidence tending to show existence of error or injustice in the military records, further consideration by the Board is not contemplated.

Your counsel has been furnished a copy of this letter.

Sincerely,

ROBERT S. YOUNG
Brigadier General, USA
Adjutant General

COPY FOR:
☑ ABCMR
☐ ADRB

[SEAL] DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
Washington, D.C. 20310

SFMR—SPARANO, CARL P. 29 SEP 1976
154-30-3390

MEMORANDUM FOR: THE ADJUTANT GENERAL

It is requested that the applicant and counsel, if any, be notified that following examination and consideration of the application and records, the Board for Correction of Military Records on 22 SEP 1976 determined that insufficient evidence has been presented to indicate probable material error or injustice, and the application is denied.

The notice to the applicant will be in the form prescribed by the memorandum from Executive Secretary, Board for Correction of Military Records to The Adjutant General, subject, Notice of Denial of Application for Correction of Military Records, dated 10 August 1955.

RAYMOND J. WILLIAMS
Executive Secretary
Board for Correction
of Military Records

Incl

DD Form 149
Ofcl Mil Pers File

ABCMR DECISION

Grant Request _____

Formal Hearing _____

Deny w/o Hearing (illegible initials)

MEMORANDUM FOR: ABCMR DATE: 16 September 1976

NAME: SPARANO, CARL P., 154-30-3390

RANK: CPT

STATUS: USAR Cntrl Gp Ret

APPLICANT REQUESTS: That, in effect, his nonselection to the gr of MAJ be set aside and he be reconsidered by a Standby Bd for prom to MAJ.

APPLICANT STATES: See DD Form 149 (TAB A).

MATERIAL EVIDENCE OF RECORD: Incorporated in this memo and included by this reference are the mil and med records which show in pertinent part:

> DOB: 22 Dec 41. Apt 2LT USAR on 2 Jun 63. EAD fr 4 Jan 64 - 3 Jan 66. Trf to USAR on 4 Jan 66 in gr of 1LT. Prom to CPT, USAR on 18 Jan 68. Actively participated in the USAR fr 1 Mar 66 - 31 Dec 72. Trf to USAR Contrl Gp (Reinf) on 1 Jan 73. Asg to a Ready Res Unit on 1 Oct 74.

On 22 Jul 75 appl elected to trf to the Ret Res as a result of being twice nonselected for prom. On 28 Jul 75 orders were issued trf him to the Ret Res eff 30 Jul 75.

In spt of his req, appl submitted a chronological list of events regarding his attempts to qual for prom educationally (see TAB B).

In furth spt of appl's req MG Howard A. Louderback, USAR, under date of 15 Mar 76, forwarded a letter to this Bd, which

briefly outlines appl's performance while a member of his unit in the USAR and recom his req be fav considered (see TAB C).

Under date of 7 May 76, Cdr, RCPAC, in response to an inquiry fr this Bd, stated, pert, that the appl was considered by the DA Res Comp Sel Bd that convened on 15 Apr 74; that this Bd was permitted to sel off who had not compl the required mil educ, provided the educ was compl by 5 Sep 74; that the appl was sel under this provision but did not compl the educ by 5 Sep 74 and his name was removed fr the recom list; that he was again considered by the Bd that convened on 1 Apr 75 and he was not sel; that at this time compl of the required mil educ prior to the date the Bd convened was a prerequisite for sel; that the appl had not compl the required educ and therefore the Bd had no alternative but not to recom him for prom; that these prerequisites were given wide dissemination so that Res Off would be able to take the steps nec to become qual prior to the date the prerequisites became mandatory on 1 Jul 72; and that it was recom his req be disapproved. (TAB D)

DISCUSSION: It would appear that appl was fairly and equitably considered for prom to MAJ on 2 occasions. The fact that he did not qual for prom educationally cannot be imputed to the Department. There is no assurance that he would have been sel had he been educationally qual at the time of his considerations. There is no evid of material error or omission in his records and therefore, it appears that he was properly removed fr an active status in the grade of captain.

CONCLUSION: The appl has failed to submit suff relevant evid to demonstrate the existence of probable material error or injustice to warrant a formal hearing.

/s/ J. W. BOYLE
John W. Boyle
Examiner

March 1980 Application to the Army Board For Correction of Military Records

SPARANO, CARL P., SFC E-7 (USAR), 154-30-3390
DD Form 149, item 11 (All Tabs Omitted)

1. That the findings and recommendations of the USAR promotion board convened on 1 April 1975 be set aside insofar as said board failed to select CARL P. SPARANO (hereafter the "Applicant") for promotion on mandatory consideration from the grade of Captain (USAR) to the grade of Major (USAR);

2. That the Applicant be considered for promotion by a standby promotion board to the grade of Major (USAR) or, alternatively, that the Applicant's military records be corrected to reflect that he was selected for promotion to the grade of Major (USAR) since he met all the requirements for such promotion from and after 25 September 1975;

3. That if the Applicant is selected for promotion to the grade of Major (USAR) by a standby board or if the Applicant's military records are corrected to reflect such promotion, his promotion be made effective as of 25 September 1975 or as of the earliest permissible date thereafter;

4. That, based upon his officer's basic pay entry date of 2 June 1963, the Applicant be awarded the difference in pay and allowances between the grade of Captain (USAR) or Major (USAR), as applicable, and his applicable enlisted grade for all USAR enlisted service performed from and after 23 June 1977; and

5. That the Army Board for Correction of Military Records make such other and further corrections and grant such other and further relief as it deems just and proper.

SPARANO, CARL P., SFC E-7 (USAR), 154-30-3390
DD Form 149, item 12

Part I

The injustice complained of is the Applicant's nonselection for promotion from Captain (USAR) to Major (USAR) by a

USAR promotion board convened on 1 April 1975 causing him to be charged with a second promotion passover and forcing him to elect transfer to the Retired Reserve in the grade of Captain (USAR). The injustice complained of resulted from a combination of the following events and circumstances making it impossible for the Applicant to complete the Finance Officers Advanced Course by 1 April 1975:

1. Erroneous advice by CW4 Francis T. Dreher, Assistant Adjutant General, 78th Division (Tng), Kilmer USAR Center, Edison, New Jersey 08817, in October of 1974 to the effect that the Applicant would have at least until 1 September 1975 in which to complete his military educational requirements for promotion to Major (USAR).

2. Failure of the appropriate promotion authority to furnish the Applicant with the notice of consideration required by para 3-4*a*, AR 135-155 (30 August 1974), which would have properly notified the Applicant at the earliest possible time of the date on which the CY 75 captains to majors USAR promotion board would be convened.

3. Correction of CW4 Dreher's erroneous advice within the 78th Division (Tng) at a time (in early February of 1975) when it was impossible for the Applicant to obtain a bulk issue of the subcourses needed in order to complete the Finance Officers Advanced Course.

4. TRADOC's decision to convert the correspondence courses handled by the US Army Institute of Administration (USAIA) from a manual to an automated system of administration (TRADOC Educational Data System (TREDS)) without making any provision to rectify the administrative dilemma which as a result of the conversion necessarily confronted students otherwise subject to time constraints and with no Army-wide provision extending the time for officers otherwise selected for promotion to complete educational requirements in 1975 to include the 6-month period utilized by USAIA to convert to TREDS.

5. HQDA's failure to extend the time for completing educational requirements in the case of officers to be considered for

promotion by CY 75 USAR promotion boards either (1) due to the permanent advancement of the convening date in 1975 as in the case of the captains to majors board from 5 September to 1 April or (2) due to TRADOC's decision to convert correspondence courses handled by USAIA from a manual to an automated system of administration (TREDS), the conversion spanning a 6-month period.

Part II

The foregoing injustice is based upon the following specific facts and circumstances in the Applicant's case:

1. In a letter dated 13 December 1973, a copy of which is inclosed at *Tab A*, the Applicant was notified that he would be considered for promotion from captain to major by a USAR promotion board to be convened on 15 April 1974. In a subsequent letter dated 18 February 1974, a copy of which is inclosed at *Tab B*, the Applicant was notified that captains recommended for promotion by the CY 74 USAR promotion board would be given until 5 September 1974 to complete their military educational requirements for promotion, namely, until the anniversary of the convening date of the CY 73 captains to majors board. Apparently, the convening date of the CY 74 captains to majors board had been advanced nearly 5 months from 5 September (for the CY 73 board) to 15 April on a one-time basis, and an effort was made in 1974 not to deprive selected captains the chance to qualify for promotion in 1974 if they had relied on the CY 73 convening date in planning the completion of their military educational requirements for promotion (*i.e.*, completion of the branch officers advanced course). There was no indication in the correspondence received by the Applicant with respect to the CY 74 board to indicate that the convening date for the captains to majors board would, in the future, be permanently moved from September to April. In a letter dated 21 October 1974, a copy of which is inclosed at *Tab C*, the Applicant was notified of his nonselection for promotion by the CY 74 captains to majors board.

2. By LO 10-458711, RCPAC, 23 October 1974, a copy of which is inclosed at *Tab D*, the Applicant was transferred from the Reinforcement Control Group to HHC, 78th Division (Tng), Kilmer USAR Center, Edison, New Jersey 08817, effective 1 October 1974. While processing into the 78th Division in October of 1974, the Applicant was asked by CW4 Francis T. Dreher, Assistant Adjutant General, about the status of his military education and was advised that he would be considered for promotion during 1975. The Applicant informed CW4 Dreher that he had completed roughly 3/4ths of the Finance Officers Advanced Course, and CW4 Dreher advised the Applicant that if USAR promotion boards in 1975 were handled the same way as in 1974 and past years, he would have at least until 1 September 1975 to complete his military educational requirements for promotion. An affidavit by CW4 Dreher confirming these facts is inclosed at *Tab E*. In reviewing his correspondence course records while preparing this application, the Applicant would note that he has discovered that he overstated the portion of the Finance Officers Advanced Course which he had completed as of October of 1974. At that time, the Applicant had in fact completed only 3/5ths of the course, but nevertheless anticipated no problem in completing the course prior to 1 September 1975. In fact, as of 1 November 1974, the Applicant had but 204 credits remaining to be completed. He completed 82 of these credits by 1 February 1975 and expected to complete the remaining 122 credits by 15 June 1975, more than 2 months in advance of what he had been led to believe was a 1 September 1975 deadline.

3. Early in February of 1975, the Applicant's well ordered plans for completing the Finance Officers Advanced Course in a timely fashion to be considered for promotion by the CY 75 captains to majors USAR promotion board fell apart due to circumstances entirely beyond his own control. Within a dav or two, CW4 Dreher of the 78th Division advised the Applicant that the CY 75 captains to majors USAR promotion board would be convened on 1 April 1975, and the Applicant received a letter from USAIA advising him of a change in the method

of administering the Army correspondence course programs administered by USAIA. A copy of the USAIA letter is inclosed at *Tab F.* CW4 Dreher advised the Applicant that he would have to complete his military educational requirements for promotion by 1 April 1975, a full 5 months earlier than he had anticipated in October of 1974. See CW4 Dreher's affidavit at *Tab E.* In its letter (*Tab F*), USAIA advised that it was in the process of converting from a manual to an automated system of administration (TREDS). According to the letter, TREDS was designed to "provide you, the student, with *the most responsive system* possible" although "conversions, particularly those of thise size, involve some degree of *delay and error*" (emphasis added). The USAIA letter further advised students to retain any subcourse examinations in their possession and to submit them for grade only upon receipt of new TREDS examination cards, when issued. Faced with this instruction, the Applicant retained his completed examinations for 6 subcourses worth 20 credits and did not receive the new TREDS examination cards until 7 April 1975.

4. In the circumstances facing him early in February of 1975, the Applicant contacted USAIA by telephone on 4 February 1975 and by letter on 6 February 1975 (copy inclosed at *Tab G*) requesting a bulk issue of the subcourses he needed to complete the Finance Officers Advanced Course. The Applicant was prepared to take vacation from his civilian employment in order to complete his military educational requirements by 1 April 1975. USAIA was unresponsive to the Applicant's requests and when he contacted USAIA by telephone on 18 February 1975 to follow up his letter (*Tab G*), he was told that the materials he had requested could not be sent and that he must wait until TREDS was operational at which time subcourses would be issued automatically under the new system. In mid-March of 1975, USAIA furnished enrolled students with a handout (AWTSD Handout 11 March 1975, a copy of which is inclosed at *Tab H*) indicating that subcourses would be issued on a one-for-one basis as completed, but that "(i)f this rate is too slow or too fast for you, let us know and

we will change our schedule to suit you." Upon receipt of the new TREDS examination cards on 7 April 1975, the Applicant again telephoned USAIA and requested a bulk issue of the remaining subcourses needed in order to complete the Finance Officers Advanced Course. His request was again denied, the USAIA handout (*Tab H*) notwithstanding, and he was told that he must wait the normal processing time on subcourse examinations submitted for grade and that no exceptions could be made. Of course, by this time (7 April 1975), the 1 April 1975 deadline for promotion purposes had passed.

5. Despite passage of the 1 April 1975 deadline for promotion purposes, the Applicant continued with the Finance Officers Advanced Course. The TREDS system started to move in May of 1975, and the Applicant completed the course in September of 1975. Inclosed at *Tab I* is a copy of the Applicant's diploma issued on 25 September 1975. Inclosed at *Tab J* and incorporated herein by reference as if fully set forth is a copy of a memorandum dated 10 October 1975 which the Applicant prepared from his records at a time when the events were fresh in his mind. This memorandum sets forth the events in chronological order from February of 1975 to September of 1975, indicating in some detail the difficulties which the Applicant encountered with USAIA (and TREDS) in completing the Finance Officers Advanced Course. At one point during this period (28 April 1975), the Applicant talked with Captain David R. Ansell at USAIA. The Applicant has been able to locate CPT Ansell, and inclosed at *Tab K* is a letter from CPT Ansell dated 29 August 1979 explaining the circumstances confronting USAIA in the period from January of 1975 to September of 1975 and confirming (1) that it is highly probable that the Applicant received no response and no action on his request of 6 February 1975 (*Tab G*) for a bulk issue of subcourses and (2) that it is possible that the Applicant's completion of the Finance Officers Advanced Course was delayed for reasons beyond his own control.

6. In a letter from First US Army on 23 June 1975, a copy of which is inclosed at *Tab L*, the Applicant was notified of his

nonselection for promotion because he had not completed his military educational requirements by the date the promotion board convened (*i.e.*, by 1 April 1975). Since this was treated as a second promotion passover, the Applicant elected transfer to the Retired Reserve in lieu of discharge. A copy of his election is inclosed at *Tab M*. By LO 07-792, Headquarters First US Army, 28 July 1975, a copy of which is inclosed at *Tab N*, the Applicant was transferred to the Retired Reserve. So as not to discard his many years of service for military retirement purposes, the Applicant enlisted in the 78th Division on 23 June 1977 and was accepted in the grade of Staff Sergeant (E-6). Inclosed at *Tab O* is a copy of the Applicant's Enlistment Agreement (DD Form 4) and other enlistment papers. On 1 May 1978, the Applicant was promoted to the grade of Sergeant First Class (E-7) by Order 42-1, para 2, Headquarters 78th Division (Tng), effective 1 May 1979. Inclosed at *Tab P* is a copy of the Applicant's promotion order. Also inclosed at *Tab Q* are copies of the Applicant's leave and earnings statements and military pay vouchers for enlisted Reserve service from 23 June 1977 through 31 January 1980. In assembling the documents inclosed at *Tab Q*, the Applicant discovered an overpayment of IDT pay on the first JUMPS leave and earnings statement issued after his enlistment. Included at *Tab Q* is a copy of the Applicant's letter transmitting to the Finance Officer of the 78th Division a repayment of such overpayment. The Applicant's enlisted Reserve service continues.

7. In short, on one hand, the Army advanced the convening date of the CY 75 captains to majors USAR promotion board by 5 months without granting officers selected for promotion the period of grace it had granted selected officers in 1974 in connection with the completion of their military education, and this was complicated, in the Applicant's case, by erroneous advice from within the 78th Division. On the other hand, for its own convenience, the Army interrupted the orderly process of administering the correspondence courses handled by USAIA and, while anticipating delays and errors, made absolutely no attempt to protect the interests of students

under time constraints in the completion of their military educational requirements for promotion. In addition, if the Applicant had been furnished the notice of consideration required by para 3-4*a*, AR 135-155 (30 August 1974), in December of 1974, like the one he had received in December of 1973 (see *Tab A*), he would have learned of the convening date of the CY 75 captains to majors USAR promotion board some 2 months before he in fact learned of the date and would then at least have been in a position to have requested a bulk issue of subcourses prior to 1 February 1975 and, therefore, at a time when such a request could have been handled by USAIA (see para 3 of the letter at *Tab K*).

8. The Applicant has asked the Commander of the 78th Division to review his application, and a letter from the Commander is inclosed at *Tab R*.

SPARANO, CARL P., SFC E-7 (USAR), 154-30-3390
DD Form 149 item 14b

1. Based upon the circumstances set forth in item 12, above, the Applicant submitted an Application for Correction of Military or Naval Record (DD Form 149) dated 29 January 1976 to the Army Board for Correction of Military Records (ABCMR) on or about 15 March 1976. On 22 September 1976, the ABCMR denied the Applicant's application for want of sufficient evidence to indicate probable material error or injustice. The Applicant was notified of this action in a letter dated 6 December 1976, a copy of which is inclosed at *Tab S*.

2. In his original application, the Applicant listed as his counsel LTC (now COL) Richard F. Plechner, a New Jersey attorney who was at the time a member of the 78th Division (Tng). The Applicant named COL Plechner as his counsel because COL Plechner had agreed to represent him at a hearing before the ABCMR in the event a hearing was granted. COL Plechner did not assist the Applicant in the preparation of his application to the ABCMR dated 29 January 1976; nor did COL Plechner review the same prior to its submission on

or about 15 March 1976. COL Plechner's letter of 14 February 1980 explaining the extent of his involvement is inclosed at *Tab T.*

3. Not fully understanding the basis for the action by the ABCMR upon his application dated 29 January 1976, and firmly believing that his nonselection for promotion in 1975 was due to manifest injustice, the Applicant asked his Congressional Representative, Honorable Helen S. Meyner, to inquire on his behalf. In a letter dated 10 October 1978, Congresswoman Meyner was advised by the Army's Congressional Correspondence Agency that if the Applicant has evidence available that would warrant reconsideration of his case, he may reapply to the ABCMR. A copy of the letter to Congresswoman Meyner is inclosed at *Tab U.* This application is made pursuant to the letter at *Tab U.* It was prepared with the assistance of MAJ Robert R. Baldwin (JAGC, USAR) and contains the evidence not considered in connection with the Applicant's original application dated 29 January 1976 and submitted on or about 15 March 1976.

December 1980 Decision of the Army Board For Correction of Military Records

SPARANO, CARL P. Mr. Tyler/kfr/20 Nov 80
154-30-3390

SFMR 3 DEC 1980

Mr. Carl P. Sparano
303 Dixon Avenue
Boonton, NJ 07005

Dear Mr. Sparano:

Reference is made to your recent request for reconsideration of an earlier application for a correction of records to show that you were selected and promoted to the grade of major in the United States Army Reserve.

Your request for reconsideration, the materials you submitted, and your military records have been considered by the Army Board for Correction of Military Records. It was unanimously determined that the new evidence and new contentions raised in your reconsideration request did not warrant a reversal of the Board's earlier decision. Inclosed is a copy of the Memorandum of Consideration which sets froth pertinent factual data contained in your service records, the issues relevant to your case, and the conclusions upon which the Board's determination is based.

You may be assured that the decision in your case was the result of a complete and impartial consideration of the entire matter.

Sincerely,

JOHN W. MATTHEWS
Executive Secretary
Board for Correction
of Military Records

Inclosure
As stated

SFMR ✓
OMPF

DEPARTMENT OF THE ARMY
BOARD FOR CORRECTION OF MILITARY RECORDS
The Pentagon, Washington, D.C.

IN THE CASE OF: SPARANO, CARL P. 154-30-3390
DATE: 19 November 1980
DOCKET NUMBER: AC 76-04429A
INDEX NUMBER: 131.01

COUNSEL:
MAJ Robert R. Baldwin

MEMORANDUM OF CONSIDERATION

I certify that hereinafter is recorded the record of consideration of the Army Board for Correction of Military Records in the case of the above-named individual. A quorum was present during the consideration.

Present:	Mr. Charles R. Woodside	Chairman
	Mr. William C. Dudding	Member
	Mr. Paul C. Miller	Member
	Mr. John W. Matthews	Executive Secretary
	Mr. Watts P. Tyler	Examiner

The Board, established pursuant to authority contained in 10 U.S.C. 1552, convened at the call of the Chairman on the above date. AR 15-185, the regulation governing the operation of the Board, provides that each application and the available military records pertinent to the corrective action requested will be reviewed to determine whether to authorize a hearing, recommend that the records be corrected without a hearing, or to deny the application.

The Board may deny an application if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice. Following consideration of the case and having made its determination thereof, proceeded to other business.

Applicant requests correction of military records as stated in application to the Board and restated herein.

The Board considered the following evidence:

Exhibit A — Application for correction of military records
Exhibit B — Military Personnel Records
Exhibit C —

ABCMR DECISION

Grant Request _____
Formal Hearing _____
Deny w/o Hearing (signatures illegible)

NAME: SPARANO, CARL P. 154-30-3390

APPLICANT REQUESTS: Reconsideration of his application for a correction of records to show that his nonselection for promotion to the grade of major, United States Army Reserve (USAR), in April 1975 is void, and that he was selected and promoted to the grade of major, USAR, on 25 Sep 75.

APPLICANT STATES: Applicant has submitted a voluminous brochure in support of his application. His primary contention is that he failed to complete the educational requirements before he was reconsidered for promotion to the grade of major in the USAR because of erroneous advice from an assistant adjutant general of the 78th Training Division. He has enclosed an affidavit from the individual (a CW-4, USAR) which indicates, essentially, that at the time the applicant was assigned to duty with the 78th Division in October 1974 he advised the applicant that if the promotion boards were handled in 1975 as they had been in the past, it would be at least until September 1975 before the Promotion Board would convene. The entire brochure is contained in the applicant's OMPF.

MATERIAL EVIDENCE OF RECORD: Incorporated in this memorandum and included by this reference are the military and medical records which reflect in pertinent part:

Date of Birth: 22 December 1941

Applicant accepted appointment as a second lieutenant, Finance Corps, USAR, on 2 Jun 63 and entered on active duty on 4 Jan 64 to attend the Finance Officer Basic Course. He was promoted to the temporary grade of first lieutenant on 4 July 1965 and released from active duty on 30 December 1965.

Following his release from active duty he was promoted to the grade of captain, USAR, on 18 January 1968.

Applicant actively participated in the Reserve Program with the 78th Training Division up until June 1972. Upon his request he was transferred to a USAR Control Group (Reinforcement) on 1 Jan 73. For the retirement year ending on 1 Jun 73 he earned a total of 34 ponts, well above the minimum of 27 points necessary for retention in an active status.

In April 1974, while the applicant was assigned to the USAR Control Group (Reinforcement) he was considered for promotion to the grade of major, USAR. He was selected for promotion with the proviso that he complete the educational requirements (Finance Officer Advance Course) by 5 Sep 74. He failed to complete the educational requirements by that time and his name was removed from the recommended list.

Applicant then requested reassignment back to the 78th Training Division (Ready Reserve) and was so reassigned on 1 Oct 74.

In April 1975 he was again considered for promotion to major, USAR. He still had not completed the educational requirements, and was not selected for promotion. Having twice failed to be selected for promotion his removal from an active status was mandatory. As a result, he was transferred to the Retired Reserve on 30 Jul 75.

A prior request for the same stated action was denied by this Board on 22 Sep 76.

Applicant subsequently enlisted in the USAR. He is currently assigned to the 78th Training Division, Edison, NJ, in the grade of sergeant first class, E-7.

DISCUSSION: It does appear that the applicant's failure to complete the military educational requirements was the cause of his nonselection for promotion to the grade of major in the USAR.

Applicant has a number of contentions which he alleges caused him to fail to timely complete the Finance Officer Advanced Course. That the course subjects were undergoing revision in 1974-75 preventing him from receiving the material

and that a warrant officer had given him erroneous information in 1975 concerning the amount of time he had to complete the educational requirements. It appears, however, that he simply waited too late to make an effort to complete the requirements. He was promoted to captain, USAR, in 1968 and the requirements for promotion to major, USAR, were announced in early 1969.

In consideration of all the evidence, allegations, and information presented by the applicant in relation to the evidence of all available records, statutory, regulatory, and staff opinions pertaining thereto, it is concluded that there is insufficient justification for changing the records to show that the applicant was selected and promoted to the grade of major in the USAR.

DETERMINATON: The applicant has failed to submit sufficient relevant evidence to demonstrate the existence of probable material error or injustice to warrant a formal hearing.

/s/ JOHN W. MATTHEWS
John W. Matthews
Executive Secretary

Complaint

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 81-1833

CARL P. SPARANO,

Plaintiff,

—VS.—

THE SECRETARY OF THE ARMY; and
THE UNITED STATES OF AMERICA,

Defendants.

COMPLAINT

Plaintiff, Carl P. Sparano, residing at 303 Dixon Avenue, Boonton, Morris County, New Jersey, for his complaint alleges:

1. Plaintiff has been a commissioned member of the United States Army Reserve since June 2, 1963.

2. Defendant Secretary of the Army, is an executive officer of the United States of America with authority over the United States Army.

3. Defendant, United States of America is a body sovereign and politic.

4. Jurisdiction for this court in the matter *sub judice* is based upon: 28 U.S.C. § 1331 (federal question); § 1343 (civil rights); § 1361 (mandamus); § 2201 (declaratory judgment); § 2202 (ancillary relief); and 5 U.S.C. § 702 (review of administrative proceedings.)

5. On or about April 1, 1975, the plaintiff was improperly passed over for a mandatory promotion to the rank of major,

thus forcing plaintiff to transfer from the active ready reserve to the retired reserve on July 30, 1975.

6. Plaintiff was passed over for the aforesaid promotion because of his failure to complete educational requirements for promotion prior to the meeting of the promotion board.

7. Plaintiff did not complete the educational requirements prior to the meeting of the promotion board because the defendants, acting through their agents: misinformed the plaintiff; failed to convey proper information to the plaintiff; and made the means for completing educational requirements unavailable to plaintiff.

8. Defendants, acting through their agents, failed to follow pertinent regulations, statutes and constitutional mandates and thus deprived plaintiff of his position as a major in the active ready army reserve.

9. Subsequent to his transfer as a commissioned officer to the retired reserve, plaintiff enlisted in the 78th Division, U.S. Army Reserve as a noncommissioned officer.

10. Subsequent to plaintiff's transfer to the retired reserve, defendants made educational resources available to plaintiff, and he completed the courses required for promotion to major.

11. Plaintiff filed a timely administrative appeal through proper channels to the defendant Secretary of the Army, thus exhausting his administrative remedy.

12. Attached hereto and made a part hereof is a complete and true copy of the administrative record.

13. On December 3, 1980, the Army Board for Correction of Military Records, acting for the defendants, denied plaintiff's request for relief.

14. The action of the defendants in denying plaintiff relief was contrary to: due process; applicable regulations and statutes; and the weight of the evidence.

WHEREFORE, plaintiff prays for judgment in his favor against the defendants:

(a) Ordering that the findings and recommendations of the USAR promotion board convened on 1 April 1975 be set aside insofar as said board failed to select plaintiff for promotion on mandatory consideration from the grade of Captain (USAR) to the grade of Major (USAR);

(b) or alternatively ordering the plaintiff be considered for promotion by a standby promotion board to the grade of Major (USAR) or, alternatively, that the plaintiff's military records be corrected to reflect that he was selected for promotion to the grade of Major (USAR) since he met all the requirements for such promotion from and after 25 September 1975;

(c) Ordering that if the plaintiff is selected for promotion to the grade of Major (USAR) by a standby board or if the plaintiff's military records are corrected to reflect such promotion, his promotion be made effective as of 25 September 1975 or as of the earliest permissible date thereafter;

(d) Ordering that, based upon his officer's basic pay entry date of 2 June 1963, the plaintiff be awarded the difference in pay and allowances between the grade of Captain (USAR) or Major (USAR), as applicable, and his applicable enlisted grade for all USAR enlisted service performed from and after 23 June 1977; and

(e) Ordering such other and further corrections and grant such other and further relief as is just and proper, including costs of suit and attorneys' fees.

/s/ JAMES B. SMITH
James B. Smith
Attorney for Plaintiff

Dated: June 10, 1981

Answer

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

(Honorable Vincent P. Biunno)

Civil Action No. 81-1833

CARL P. SPARANO,

Plaintiff,

—v.—

THE SECRETARY OF THE ARMY and
THE UNITED STATES OF AMERICA,

Defendants.

ANSWER

Defendants Secretary of the Army and United States of America, by their undersigned attorneys, hereby answer the Complaint of the plaintiff in this cause as follows:

1. The allegations contained in paragraphs one, two and three are admitted.

2. The allegations contained in paragraph four constitute conclusions of law which require no answer; however, to the extent said allegations are deemed to be factual in nature, they are denied.

3. The allegations contained in paragraphs five, six, seven and eight are denied.

4. The allegations contained in paragraph nine are admitted.

5. The allegations contained in paragraph ten are denied.

6. The allegations contained in paragraph eleven constitute conclusions of law which require no answer; however, to the extent said allegations are deemed to be factual in nature, they are denied.

7. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph twelve and on that basis denies said allegations.

8. The allegations contained in paragraphs thirteen and fourteen are denied.

AFFIRMATIVE DEFENSES

Separately and affirmatively, the defendants, Secretary of the Army and the United States of America, allege that:

1. Plaintiff fails to state a claim upon which relief may be granted.

2. This Court lacks subject matter jurisdiction in that plaintiff's claim for money damages in addition to equitable relief exceeds ten thousand dollars.

3. Plaintiff's claims of misrepresentation are barred by 28 U.S.C. § 2680(h).

4. The decision of the Secretary of the Army not to promote plaintiff is a discretionary act for which the United States is immune under 28 U.S.C. § 2680(a).

5. This Court is without jurisdiction to grant plaintiff's requested relief under 28 U.S.C. § 1361; § 2201; § 2202; § 1331; § 1343 and 5 U.S.C. § 702.

WHEREFORE, the defendants pray that plaintiff take nothing by way of his Complaint in this cause, that the same be dismissed with defendants' cost of suit incurred in consequence thereof and for such other and further relief as the Court deems appropriate in this action.

WILLIAM W. ROBERTSON
United States Attorney

By: LOUIS J. BIZZARRI
Louis J. Bizzarri
Assistant U.S. Attorney

Pretrial Order

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Vincent P. Biunno, U.S.D.J.

Civil Action No. 81-1833

Non-Jury

CARL P. SPARANO,

Plaintiff,

—v.—

THE SECRETARY OF THE ARMY, ET AL.,

Defendants.

BEFORE THE HONORABLE ROBERT E. COWEN
UNITED STATES MAGISTRATE

February 1, 1982
Newark, New Jersey

APPEARANCES:

James B. Smith, Esq.
For Plaintiff

John W. O'Farrell
Assistant U.S. Attorney
For Defendants

PRETRIAL ORDER

1. NATURE OF THE ACTION: Review of administrative action by Army Board for Correction of Military Records. Jurisdic-

tion is founded upon 28 U.S.C. §§ 1331, 1343, 1361, 2201 and 2202; and 5 U.S.C. § 702.

2. FACTUAL CONTENTIONS:

A. Plaintiff's factual contentions are attached.

B. Defendants' factual contentions are attached.

3. ADMISSIONS AND STIPULATIONS: There is no dispute between the parties as to the following facts:

A. The parties agree that plaintiff served as a commissioned officer in the Army Reserve from June 2, 1963, until July 30, 1975, and that he now serves as an enlisted man.

B. Plaintiff was transferred from active status in the U.S. Army Reserve to the retired reserve following his second non-selection for a mandatory promotion to Major based upon the government's position that he failed to complete the education specifications for promotion.

4. DAMAGES: Plaintiff seeks $8,242.11, damages for back pay and allowances, which damages are continuing, together with restoration of his commission or, at the very least, consideration by the Board for promotion to the rank of Major.

5. AMENDMENTS TO THE PLEADINGS: None.

6. LEGAL ISSUES:

A. Subject matter jurisdiction.

B. Did the Army Board for Correction of Military Records err or abuse its discretion in failing to consider the plaintiff for promotion to the rank of Major.

C. Damages.

7. LEGAL ISSUES ABANDONED: None.

8. EXHIBITS: All exhibits are to be premarked for identification and each side is to prepare his or its own exhibit list for the use of Judge Biunno, Courtroom Deputy Clerk and all counsel. The original and copy of each party's exhibit list is to be given to Judge Biunno's Courtroom Deputy immediately prior to the commencement of trial.

9. ADDITIONAL DISCOVERY:

A. Within 30 days from the date of this Order, plaintiff shall present himself for the purpose of giving his deposition, at a time and place to be mutually agreed to between the parties. In the event counsel cannot agree upon a date and time for the deposition, plaintiff shall sit for his deposition on the last Saturday of this 30 day period commencing at 9:00 A.M., at the office of his counsel.

B. Within 30 days from the date of this Order, defendants shall furnish to the plaintiff a certified or true copy of the administrative record of the plaintiff, at the photocopying expense of the plaintiff or, in the alternative, in written form designate to plaintiff's counsel in particular how the records annexed to the complaint are in error or are incomplete.

C. All further discovery is closed.

10. MOTIONS: Either party is at liberty to file motions seeking summary judgment; however, such motions must be filed within 60 days from the date of this Order or be deemed waived.

11. EXPERT WITNESSES: At the time of trial each party will be limited to not more than three expert witnesses.

12. ESTIMATED LENGTH OF TRIAL: Two day non-jury trial.

13. Not later than April 1, 1982, both parties shall deliver to Judge Biunno a trial memorandum of law setting forth its legal position as it applies to the facts of its case on each legal issue. Failure of either party to adequately brief each legal issue as it

applies to the facts of this case may be deemed by the Court as a waiver, abandonment or withdrawal of that claim, defense or position.

14. Not later than April 1, 1982, both parties are to deliver to Judge Biunno and serve upon their adversary proposed findings of fact and proposed conclusions of law separately set forth in separately numbered paragraphs, which are recommended as appropriate for the Court to adopt as its findings. Not later than April 15, 1982, each party shall critique his adversary's proposed findings and conclusions.

15. This pretrial order has been formulated after conference with all parties in attendance. This Order supersedes the pleadings in this case and hereafter will govern the trial of this matter, and may not be amended except by Order of the Court to prevent manifest injustice. Any party having objection to the terms or provisions of this Order is to set forth that objection in a Notice of Motion filed within 10 days of the date of this Order or the objection shall be deemed waived.

/s/ ROBERT E. COWEN
Robert E. Cowen
United States Magistrate

3. *Plaintiff's Factual & Legal Contentions*:

Plaintiff was commissioned an officer in the U.S. Army Reserve on June 2, 1963. He entered on active duty as a Second Lieutenant on January 4, 1964. He was promoted to First Lieutenant on July 4, 1965. On December 30, 1965, he was released from active duty.

Plaintiff then actively participated in the Ready Reserve as a member to the 78th Training Division. On January 18, 1968, he was promoted to Captain.

On January 1, 1973, plaintiff transferred to a Control Group (Reinforcement.) While in the Control Group, Cpt. Sparano was considered for promotion to Major. The promotion was approved in April 1974 with the proviso that he complete the Finance Officer Advance Course by September 5, 1974. On a one-time basis the Promotion Board had met 5 months earlier than the usual September meeting. Plaintiff had not been informed that he could have transferred to an inactive reserve status instead of to a Reinforcement Control Group. This would have stopped the running of time in grade for promotion purposes and prevented promotion passovers. In September 1973, the Army changed promotion requirements from 50% of the Advanced Course to 100%. Plaintiff did not complete 100% of the Advanced Course by September 5, 1974, so he was passed over for promotion to Major.

On October 1, 1974, Cpt. Sparano transferred back into the 78th Division. At that time he was informed by Chief Warrant Officer Francis T. Dreher, Assistant Adjustment General of the 78th Division, that plaintiff had until September 1, 1975, to complete the Advanced Course and be eligible for Major on a mandatory promotion. This advice was erroneous, and defendants failed to furnish the plaintiff with notice of consideration as required by Army Regulation [AR] 135-155, Paragraph 3-4a (30 Aug, 74). At that point, Cpt. Sparano had 60% of the Advanced Course completed, by February 1, 1975, he had all but 122 credits done and anticipated finishing the course by June 15, 1975, 2 1/2 months ahead of what he believed the deadline to be.

However, in February, 1975, CWO Dreher informed Cpt. Sparano that the mandatory promotion board would meet in April again, not in September as usual. Cpt. Sparano had only until April 1, 1975, to complete the course.

On February 4, 1975 and February 6, 1975, Cpt. Sparano contacted the Army correspondence course school to obtain a bulk issue of course material. He was prepared to take a vacation from his civilian job to get the course done. However, the school had decided to convert from a manual to an automated administration system. Defendants agents shut the operation down during the conversion and made no provision for getting course materials distributed to students. Plaintiff again requested a bulk issue of material, but his requests were denied. April 1, 1975, came and went without plaintiff receiving necessary materials. Because of defendants' action, plaintiff was denied the means to meet the standard set by the defendants.

In May, 1975, the school started sending material again—one subcourse at a time. By September 1975, plaintiff had completed the course. But Cpt. Sparano had been passed over on a mandatory promotion solely because of failure to complete the course. He had to elect transfer to the Retired Reserve or discharge. He chose the former and then rejoined the 78th Division as a Staff Sergeant.

Plaintiff appealed to the Army Board for Correction of Military Records. He was denied relief. Plaintiff now seeks review of the Boards refusal.

Cpt. Sparano initially filed an application with the Board in 1976. That application was not prepared with the assistance of counsel. It did not contain any evidence (other than self-serving declarations and extraneous materials) to support his claims and was a bad presentation. SFC Sparano's first application was denied because of "insufficient evidence . . . to indicate probable material error or injustice." The second application, although complete on its face, was treated as a request for reconsideration and was likewise denied for want of "sufficient relevant evidence to demonstrate the existence of probable error or injustice to warrant a formal hearing."

The Board passed SFC Sparano's application off simply as involving just another officer who delayed too long in attempting to complete his educational requirements when (1) the school in which he was enrolled shut down at a critical point in time (see *Tab K* of the documentary evidence) and (2) regulations requiring the furnishing of a notice of consideration for promotion (AR 135-155, para. 3-4*a*, 30 August 1974) were ignored by those responsible for seeing that SFC Sparano was properly notified. The Board misunderstood the first of these points (nothing erroneously that "course subjects were undergoing revision in 1974-75") and did not even comment on the second despite the fact that AR 15-185 (Army Board for Correction of Military Records), para. 10*e*, requires the Board to include in its memorandum of consideration reasons for rejecting an applicant's claims of regulatory violations. In addition, while the Board states that the educational requirements for USAR promotion to major were announced in 1969, in September of 1973 (during the very time when SFC Sparano was in the USAR Control Group Reinforcement and, therefore, somewhat out of touch with current developments), the educational requirements were increased from completing 50% of the Advanced Course to completing 100%, a point about which the Board seems to be unaware.

An injustice was done to SFC Sparano back in 1975, and that injustice had been perpetuated by the Board's determination on his application.

FACTUAL CONTENTIONS OF DEFENDANT

Plaintiff was in fact transferred from active status in the United States Army Reserve to the Retired Reserve following his second non-selection for mandatory promotion to major based upon his failure to complete the education prerequisites for promotion. His case was twice considered by the Army Board for Correction of Military Records which denied his requested relief.

Defendant submits that plaintiff was properly transferred from active status pursuant to 10 U.S.C. § 1001, (1976); that defendant's decision to transfer plaintiff from active status was properly reviewed by the Army Board for Correction of Military Records in accordance with all statutes and regulations and further, that the decision of the Board for Correction of Military Records was not arbitrary or capricious or contrary to law or unsupported by substantial evidence. Defendant further submits that any failure of plaintiff to fullfill the education requirement for promotion was solely due to errors or omissions of plaintiff.

District Court Opinion on Motion for Summary Judgment

UNITED STATES DISTRICT COURT
Room 411, U.S. Post Office Building
Newark, New Jersey 07102
FTS (8) 341-2517

VINCENT P. BIUNNO (201) 645-2517
Judge (201) 642-2451

MEMORANDUM

Re: Sparano v. USA/Sec. of Army
Civ. 81-1833

This is a review of a decision by the Army Board For Correction of Military Records. (Board). The jurisdiction of the District Court to review a Military Board has been clearly established within this circuit *Ragoni v. U.S.*, 424 F.2d 263 (CA 3, 1970), *Neal v. Sec of Navy,* 639 F.2d 1029 (CA 3, 1981).

The review is limited to a review of the record before the Board to determine whether there was substantial evidence to support the findings of the Board. The court is not to make evidentiary findings of its own *Neal,* supra.

The petitioner was an officer in the United States Army Reserve. He obtained the rank of Captain January 18, 1968. He served as Finance Officer of 78th Training Division, Army Ready Reserve.

At the time of his promotion in 1968 the Army required that a Captain complete at least 50% of his Officer Advance Courses in order to be eligible for promotion to the rank of Major, AR 135-55 This regulation was changed in 1969 to require that 100% of the Officer Advance Courses be completed in order to be eligible for promotion to Major. In the absence of a vacancy, a Captain cannot advance to Major until the completion of seven years service as Captain, and is automatically considered for promotion at that time, AR 135-155 (Oct. 1969).

In 1972 petitioner encountered disagreement with the commanding general of the 78th Division due to the fact that petitioner wore a wig to conceal his baldness. He could not resolve this with his commanding officer, so at his own request he transferred to a Reserve Control Group in January, 1973 (Ex A pg 18). Petitioner remained with this unit until October 1, 1974 when he transferred back to the 78th Training Division (after a new commanding general took office).

While petitioner was still in the Control Group in April of 1974, he first became eligible for consideration for promotion to Major. In 1974 the Army changed its dates when promotion boards would be scheduled to meet. The meetings had usually been held in September. Possibly because of the Federal fiscal year change, the meeting date of the promotion board was moved from September, 1974 to April, 1974. However, the education requirement was allowed to be completed by September, 1974 so as not to prejudice anyone due to the change that transition year. The petitioner was notified of his consideration and of the changes by letters to his home on December 13, 1973 (Ex C pg 27) and February 18, 1974 (Ex C pg 28).

The petitioner failed to complete his educational requirements by the September date and on October 21, 1974 (Ex C pg 29) he was notified of his being passed over for promotion. This letter also informed the petitioner that he would be considered by the next board that met, that meeting the education requirement was mandatory, and if the next promotion board failed to select him he would be discharged from Army Reserve.

On petitioner's return to the 78th Training Division in October, 1974 he had spoken with Warrent Officer Francis T. Dreher (Ex C pg 31) in regard to his eligibility for promotion. He was advised that "if USAR promotion boards were handled in 1975 as they were in 1974", he would have until at least September, 1975 to complete his educational requirements. In December, 1974 through IA Cir 135-23 (Ex C pg 35) the 78th Division was informed that the promotion board for Major was to meet in April of 1975. In February, 1975 Warrent Officer Dreher informed petitioner the promotion boards

would not be handled as they were the previous year and that his educational material must be completed by April.

At this point petitioner made an effort to complete his education by getting bulk courses from the correspondence school conducting the courses (USAIA). The petitioner was unable to get everything he needed due to an administrative conversion of the school to a computer system. When the promotion board met in April of 1975, petitioner once again was not promoted for failure to complete his educational requirements, and was retired from the Army Reserve.

On appeal to the Board, the denial of his promotion was upheld because petitioner simply waited too long to complete his education. Thus no injustice occurred to the petitioner.

The petitioner argues that several events worked together to prevent him from completing his educational requirements; that since these events were not of his own making, there is an injustice that the Board could have corrected. Thus, he says, this court should find that there is no substantial evidence to support the Board holding that no injustice occurred to petitioner.

The first event complained of is that petitioner's transfer from the 78th Training Division to the Reserve Control Group took petitioner out of touch with Army affairs. Thus he was unaware of the change in requirements for promotion from 50% to 100% of the educational courses.

This allegation is simply not true. The petitioner voluntarily transferred to the Control Group in January, 1973. The change in regulations that petitioner claims he would not know of because of being in the Control Group occurred in October, 1969 while the petitioner was still in the 78th Training Division. Thus petitioner should have known as early as 1969 that he had to complete 100% of the educational requirements for Major. At this time he still had six years to complete the courses.

The next event the petitioner complains of is that the Army failed to inform him of his selection for Major by the April, 1974 promotion board, provided he completed his courses by September, 1974. This argument is an attempt to turn the court's attention away from petitioner's own neglect during

that period. The petitioner was informed in December of 1973 of his consideration, and he knew he had to complete his education by September, yet he did not do so.

As an officer the petitioner knew he would only be considered twice for promotion, and if he were twice denied he would be forced out of the Army. It is hard to believe that an officer who is under consideration for promotion would not make every effort to meet the requirements by the time the promotion board met. He cannot now blame the Army for not specifically informing him of his conditional selection, when he had 9 months notice that the Army expected that Captains eligible for promotion to Major should have their courses completed by September, 1974.

Further, petitioner could have obtained notice of his selection if he was truly interested. The results of the April, 1974 Board were published in AR 624-2 (Ex C pg 37). Since an officer is to be aware of all such publications, the petitioner is held to have had actual notice of his selection.

The petitioner next argues that he was misinformed as to the date he had to complete his education by Warrent Officer Dreher. This is simply a misinterpretation by petitioner of what he was told. Petitioner was told that "*if*" the April, 1975 promotion board was run as the April, 1974 board had been, he would have until September, 1975 to complete his courses. That petitioner took this to mean he need not complete his courses until September, 1975 is not the Army's fault. Petitioner could have investigated the matter on his own, rather than do nothing until it was too late.

The petitioner's final complaint stems from the temporary closing of the Army Correspondence School on February, 1975. Petitioner claims that he discovered that he had to complete his education by April 1975 in February, 1975 and made every attempt to get the courses needed (Ex C pg 40). Although the school kept telling students it would be able to furnish the needed material it could not and in petitioner's case, it did not.

There is no doubt that had the school not closed down, petitioner would have had time to complete his courses. But

this was not an injustice as the petitioner claims. Rather any harm that the closing caused petitioner was caused by petitioner's own delays in earlier years especially since he knew he had been passed over in 1974, and knew he had not finished his courses.

The petitioner had from 1968 to work on his educational requirements. Yet by his own admission he waited until he had only 2 months left to complete the final 20% of his courses. He cannot now blame the Army because his need coincided with the same two months when the school was closed. Petitioner chose to do the final 20% of the work when he had more than seven years to complete it. Had petitioner shown a bit more diligence earlier in that period he would not have found himself in the situation he was upon the closing of the school.

In any event, these arguments go to a matter of discretion, the authority to exercise which is in the Board, not in the court. The facts clearly show that there was substantial evidence to support the Board in exercising its discretion in the way it did, and even if this court were of a view that it should have been exercised the other way, which it is not, it could not set aside the result below.

Accordingly, it is found that there is substantial evidence in the record to support the holding of the Board that "he simply waited too long to make an effort to complete the requirements".

May 26, 1982

/s/ Vincent P. Biunno, U.S.D.J.

Original to Clerk
xc: James B. Smith, Esq.
Louis J. Bizarri, AUSA

Order of District Court Granting Motion for Summary Judgment

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

(Honorable Vincent P. Biunno)

Civil Action No. 81-1833

CARL SPARANO,

Plaintiff,

—v.—

UNITED STATES OF AMERICA,
SECRETARY OF THE ARMY,

Defendant.

This matter being opened to the Court by James B. Smith, Attorney for plaintiff, upon cross motions for summary judgment, and Louis J. Bizzarri, Assistant United States Attorney appearing for the defendants United States of America and the Secretary of the Army, and the Court having read and considered the memoranda of law and exhibits submitted by Counsel, and having heard oral argument thereon, and the Court having found that there is substantial evidence in the record to support the finding of the Army Board for Correction of Military Records, and the Court having further found that the defendants are entitled to judgment as a matter of law,

IT IS on this 1st day of July, 1982,

ORDERED that defendants' motion for summary judgment be and the same is hereby granted. No costs.

/s/ VINCENT P. BIUNNO
Vincent P. Biunno
United States District Judge

Notice of Appeal

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Honorable Vincent P. Biunno

Civil Action No. 81-1833

CARL SPARANO,

Plaintiff,

—v.—

UNITED STATES OF AMERICA,
SECRETARY OF THE ARMY,

Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that CARL SPARANO, plaintiff named above, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order dated July 1, 1982 and entered on July 2, 1982 granting defendant's motion for summary judgment.

RIBIS, MCCLUSKEY & SWEENEY

By KENNETH J. HANKO
Kenneth J. Hanko
636 Morris Turnpike
Short Hills, New Jersey
(201) 467-3310

DATED: August 27, 1982

Judgment Order

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5527

CARL P. SPARANO

v.

THE SECRETARY OF THE ARMY; and
THE UNITED STATES OF AMERICA

Carl Sparano, Appellant

(Civil No. 81-1833—D.N.J.—Newark)

District Judge: Honorable Vincent P. Biunno

Argued March 9, 1983

Before:

SEITZ, *Chief Judge*,
HIGGINBOTHAM and SLOVITER, *Circuit Judges*.

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ SEITZ
Chief Judge

ATTEST:

/s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

DATED: March 14, 1983

Order of U.S. Court of Appeals
Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5527

CARL P. SPARANO
v.
THE SECRETARY OF THE ARMY; and
THE UNITED STATES OF AMERICA

Carl Sparano, Appellant
(Civil No. 81-1833—D.N.J.—Newark)
District Judge: Honorable Vincent P. Biunno

Present: SEITZ, *Chief Judge*,
ADAMS, GIBBONS, HUNTER, WEIS,
HIGGINBOTHAM, SLOVITER, BECKER,
Circuit Judges.

SUR PETITION FOR REHEARING

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who partici-

pated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ SEITZ
Collins J. Seitz
Chief Judge

DATED: April 7, 1983

Order of U.S. Court of Appeals for Stay of Mandate

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5527

CARL P. SPARANO
vs.
THE SECRETARY OF THE ARMY; and
THE UNITED STATES OF AMERICA

Carl Sparano, Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until July 6, 1983.

/s/ SEITZ
Chief Judge

Dated: April 12, 1983

5 U.S. Code § 704

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

10 U.S. Code § 1552

§ 1552. Correction of military records: claims incident thereto

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for

the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due to claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid—

(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue to pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Administrator of Veterans' Affairs.

(Aug. 10, 1956, ch. 1041, 70A Stat. 116; June 29, 1960, Pub. L. 86-533, § 1(4), 74 Stat. 246.)

28 U.S. Code § 1254

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

28 U.S. Code § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S. Code § 1361

§ 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S. Code §§ 2201, 2202

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading,

may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Extracts of Army Regulation 15-185

1. Scope and applicability. This regulation establishes procedures for making application, and the consideration of applications, for the correction of military records by the Secretary of the Army acting through the Army Board for Correction of Military Records (hereinafter referred to as the Board). This regulation is applicable to the Army National Guard and the US Army Reserve.

2. Authority. Section 131 of the Legislative Reorganization Act of 1946 (60 Stat. 831; 2 U.S.C. 190g) provides that no private bill or resolution, and no amendment to any bill or resolution, authorizing or directing the correction of military or naval records, shall be received or considered in either the Senate or the House of Representatives. Section 1553 of Title 10, United States Code, which restates and codifies Section 207 of the same act, as amended, provides— . . .

* * *

4. Functions. The function of the Board is to consider all applications properly before it for the purpose of determining the existence of an error or an injustice.

5. Jurisdiction. The Board will have jurisdiction to review and determine all matters properly brought before it consistent with existing law.

* * *

10. Consideration of application. *a.* Each application and the available military or naval records pertinent to the corrective action requested will be reviewed to determine whether to authorize a hearing, recommend that the records be corrected without a hearing, or to deny the application without a hearing. The Board will make this determination in all cases except those in which the application has been denied administratively for the reason that the applicant has not exhausted all other effective administrative remedies available to him/her, that effective relief cannot be granted, or for the reason the applicant did not file the application within 3 years after he/she discovered the alleged error or injustice and did not submit any reason why the Board should find it to be in the interest of justice to excuse the failure to file the application within the prescribed 3 years.

* * *

e. The brief statement of the grounds for denial will include the reasons for the determination that relief should not be granted, including the applicant's claims of constitutional, statutory, and/or regulatory violations rejected, together with all essential facts upon which the denial is based, including, if applicable, factors required by regulation to be considered for determination of the character and reasons for a discharge. Attached to the statement will be any advisory staff opinions considered by the Board not fully set forth in the statement and any minority opinions. Counsel and applicant will be informed that the name and final vote of Board members will be furnished or made available upon request.

f. The brief statement of the grounds for denial, together with all attachments, will be furnished promptly to applicant and counsel. Classified or privileged material contained in or

attached to the statement of grounds for denial may be deleted only if a written statement of the basis for the deletion is provided the applicant and counsel.

Extract of Army Regulation 135-155

* * *

3-4. Notice of consideration. *a.* The promotion authority will send a letter (fig. 3-1) to each nominee who is in the zone of consideration by a mandatory selection board (para 2-7) and not on active duty. The letter may be reproduced locally and bear facsimile signatures.

* * *

4-13. Promotion announcement. Promotion authorities will complete the appropriate promotion letters (fig. 4-2 or 4-3) and distribute them as shown in *a* and *b* below. Commissioned officers who are not on active duty will also be furnished an Army Reserve officer career pattern development opportunities letter (fig. 4-4), which may be reproduced locally and bear facsimile signatures.

a. USAR members. The original copy of the promotion letter will be forwarded to the individual through command channels and one copy filed in his MPRJ. An additional copy will be furnished to—

(1) Commander, RCPAC, ATTN: AGUZ-PRD-O, for members not on extended active duty.

* * *

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